

Service Date: November 26, 1997

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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| IN THE MATTER OF the Application of a |) | UTILITY DIVISION |
| Sprint Communications Company L.P., |) | |
| Pursuant to 47 U.S.C. Section 252(e) of the |) | DOCKET NO. D97.8.160 |
| Telecommunications Act of 1996 for |) | |
| Approval of its Interconnection Agreement |) | ORDER NO. 6030 |
| with U S WEST Communications, Inc. |) | |

FINAL ORDER APPROVING INTERCONNECTION AGREEMENT

I. Introduction and Procedural Background

On February 8, 1996, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the 1996 Act) was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange telecommunications market. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §251(c) and §252(a).

U S WEST and Sprint Communications Company L.P. (Sprint) negotiated an interconnection contract after Sprint requested contract negotiations. The agreement is entitled "Negotiated/Arbitrated Agreement for Interconnection, Resale and Unbundled Elements" (Agreement).

Sprint submitted the interconnection agreement to the Montana Public Service Commission (Commission) for approval on August 28, 1997. The parties' Agreement was reached through voluntary negotiations and requires Commission approval prior to implementation pursuant to 47 U.S.C. §252(e). The Commission must approve or reject the Agreement no later than November 26, 1997, 90 days following the request for approval, or it will be deemed approved. 47 U.S.C. §252(e)(4).

On September 3, 1997, the Commission issued a Notice of Application and Notice of Opportunity to intervene and comment. The notice established September 24, 1997 as the deadline for intervention and limited intervenors to addressing the grounds for Commission action identified in Section 252(e)(2)(A) of the Act. The Notice stated that no public hearing was contemplated by the Commission unless requested by an interested party by September 24, 1997.

The Notice further stated that comments were required to be filed no later than October 6, 1997.

The Notice published by the Commission in this proceeding advised interested parties in the geographic areas affected by the Agreement that intervention in the proceeding was limited and that Montana Consumer Counsel (MCC), the only permitted intervenor, could be contacted to represent consumer interests. The MCC neither requested intervention nor filed comments.

U S WEST filed comments and Sprint submitted reply comments.

Upon review of the Agreement, the Commission makes the following findings, conclusions and order.

II. Applicable Law and Commission Decision

1. The Interconnection Agreement between U S WEST and Sprint provides for, inter alia: interconnection by means of collocation, entrance facilities or meet point arrangements; the exchange of traffic between U S WEST and Sprint; compensation for transport and termination of such traffic; the use of interim and permanent Number Portability; the purchase of U S WEST's retail services for resale; the acquisition of unbundled network elements from U S WEST; Sprint customer access to operator assistance, Directory Assistance and E911 service; access to poles, conduits and rights-of-way; access to operational support systems and myriad other arrangements necessary for Sprint's provision of competitive local exchange services.

2. The Commission must approve or reject the parties' agreement, with written findings as to any deficiencies, no later than November 26, 1997. 47 U.S.C. § 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION - The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. §252(A)] if it finds that:

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

3. Notwithstanding the limited grounds for rejection in 47 U.S.C. §252(e)(2)(A), the state commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

4. Unlike an agreement reached by arbitration, a voluntarily negotiated agreement need not comply with standards set forth in Section 251(b) and (c). Significantly, standards set forth in § 251(c) and which this agreement may have been negotiated "without regard to" include the following:

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE

CARRIERS. --In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(2) INTERCONNECTION.--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carriers' network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and

(D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

47 U.S.C. § 251(c). This section and • 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in • 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

By approving the Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that •• 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

5. This Agreement contains no provision that would restrict customers from

transferring between providers should their accounts be "in arrears," a clause which has been rejected by the Commission in agreements for resale of services between U S WEST and other providers.

6. Except for the comments filed by U S WEST and Sprint, no comments have been received that express any reservations about the parties' Agreement not complying with federal law as cited above or with state telecommunications requirements. The MCC, who represents the consumers of the State of Montana, has not intervened or filed comments that indicate that he believes that the Agreement is not consistent with the public interest, convenience and necessity.

No other telecommunications carrier has filed comments to indicate that the Agreement is discriminatory toward a carrier not a party to the Agreement.

U S WEST comments:

7. U S WEST emphasizes that the Agreement presented by Sprint for approval was executed on July 15, 1997, three days before the United States Court of Appeals for the Eighth Circuit rendered its decision in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), invalidating portions of the August 8, 1996 First Report and Order of the Federal Communications Commission (FCC) implementing the interconnection provisions of the 1996 Act in CC Docket 96-98. U S WEST states that the Agreement requires significant modification to bring its terms and conditions into compliance with the Eighth Circuit decision. U S WEST

further states that the parties recognized such a possibility and included provisions for such modification in their Agreement. Specifically, •36.22 of the Agreement provides that it "shall be interpreted solely in accordance with the terms of the Act and the applicable state law in the state where the service is provided." U S WEST further states that the Agreement contemplated that its provisions might be affected by the litigation consolidated in the Eighth Circuit Court of Appeals, recognizing in • 36.7, a severability provision, that some of the provisions in the Agreement could be held to be unenforceable, in which case either party may seek regulatory intervention. In • 36.19, the parties agree to amend the Agreement in writing and to work cooperatively to negotiate and implement changes and conditions.

8. U S WEST contends that Sprint's petition for approval raises a significant policy consideration for the Commission; i.e., whether the Commission wants to consider a petition for approval of a negotiated agreement when the agreement is not final, but requires further negotiations. U S WEST states that if the Commission reviews the Agreement in this proceeding and approves it, the Commission (1) does so with full knowledge it is going to have to repeat the process in the very near future after the remaining provisions are negotiated by the parties, and (2) agrees to review the Agreement "piecemeal", thus opening the door to similar requests for partial approvals for other interconnection agreements.

9. U S WEST asserts that the Commission should either refuse to review this Agreement or expressly condition its approval with a provision that neither party must perform a provision of the agreement which the party contends has been superseded by the Eighth Circuit's decision. U S WEST argues that a failure by the Commission to include such a provision in its approval order would deny one of the parties due process of law because it would require the party to give up its position without a hearing on the merits.

10. U S WEST also requests, if the Commission approves the Agreement, that the approval order recognize that the Agreement must be modified to bring its terms and conditions into compliance with the Eighth Circuit's decision, as required by the terms and conditions of the Agreement, and further require the parties to negotiate and submit such modifying language to the Commission within 60 days of the Commission's order.

Sprint's comments:

11. Sprint points out that, significantly, U S WEST does not recommend that the Commission reject the Agreement and all but concedes that it would be appropriate for the Commission to approve the Agreement with the understanding that there may be future amendments required by the Eighth Circuit's decision in Iowa Utils. Bd. Sprint does not believe that U S WEST's concerns should prevent the Commission from considering the submitted Agreement at this time. The Commission can consider any future amendments that the parties may negotiate as a result of the Eighth Circuit decision at a later time.

12. Sprint states that U S WEST does not argue that the Agreement fails to meet the requirements of • 252(e) of the 1996 Act. U S WEST does not contend that the Agreement discriminates against a telecommunications carrier not a party to the Agreement or is not consistent with the public interest, convenience and necessity.

13. Sprint argues that approval of the Agreement should not be delayed due to the possibility of amendments stemming from the Eighth Circuit decision. Contrary to U S WEST's argument, the Agreement is a final agreement and any policy questions as to whether a "piecemeal" consideration of the Agreement should be made do not apply. Sprint emphasizes that the Agreement is a final, complete and enforceable contract signed by both Sprint and U S WEST which, upon Commission approval, will allow Sprint to provide competitive telecommunications services as envisioned by the 1996 Act. It is a master agreement applicable to all U S WEST states, except for certain provisions tailored to comply with specific state requirements.

14. Sprint states that the Agreement generally provides for the potential need for future amendments to the Agreement, which can be triggered by a number of events, including but not limited to court decisions that affect the FCC's interconnection rules. Sprint argues that the possibility that the Agreement may have to be amended at some point in the future should not prevent approval of the Agreement now. It notes further that presumably any interconnection agreement submitted to the Commission for approval by any parties provides or will provide the possibility of future amendments, a contingency which does not render the agreements incomplete or not final. Sprint only seeks approval of the Agreement as it was on the date it was signed.

15. Sprint notes that the Agreement also contains other provisions which defer determination of specific issues, such as the pricing and

standards of performance for services acquired from U S WEST. The existence of these provisions should not prevent Commission approval of the Agreement simply because not all the details are set forth. The potential need for amendments is no reason to delay approval. Taking U S WEST's argument to its logical extreme leads to the conclusion that the Commission should approve no interconnection agreement until all contingencies that may lead to any possible amendment of the agreement have been completely resolved. Sprint further believes that U S WEST appears to be taking the opportunity to force renegotiation of provisions of the Agreement which were clearly not the subject of, or affected by, the court opinion.

16. Sprint argues that such an approach would serve U S WEST's interests of delaying competition in its local markets by postponing the approval of interconnection agreements by at least several months. It further emphasizes that once all appeals of the Eighth Circuit decision are finished, it may be that no amendments to the Agreement are ultimately required, which would make any delay in its approval based on that court's decision totally unwarranted.

17. Sprint urges the Commission to approve the Agreement subject to the recognition that it may need to be amended to address the Eighth Circuit decision. Sprint notes that the Agreement contains no contractual time limit for negotiating revisions to the Agreement, but would not object to the Commission's imposition of a reasonable deadline, such as 60 days from the date of the Commission order approving the Agreement, for submitting either negotiated amendments or a request for arbitration of unresolved issues arising from the Eighth Circuit opinion.

18. Finally, Sprint strongly objects to U S WEST's suggestion that the Commission expressly provide in the order "that no party must perform a provision of the Agreement which the party contends has been superseded by the Eighth Circuit's decision." Sprint argues that the Commission should not give U S WEST explicit authorization to ignore any provisions which it "contends" are affected by the court opinion. This would only provide U S WEST with further incentive to unreasonably interpret the court's decision and that Commission sanction of U S WEST's position would adversely affect negotiations to amend the Agreement.

Commission analysis of comments:

19. U S WEST has made arguments that the Commission should not approve a "piecemeal" agreement. It considers this a "piecemeal" agreement because it may have to be amended to reflect the Eighth Circuit court's decisions. The Commission concurs with Sprint that this is a complete and final agreement, intended to set the terms for interconnection. This Agreement is lengthy (270 pages) and appears to cover every possible facet of interconnection. It contains provisions for amending the agreement in a manner similar to previously filed agreements that U S WEST has executed with other parties. Nowhere does the contract indicate that it is only a part of the whole. In fact, the Agreement states in • 36.14 on p. 242, "This Agreement constitutes the entire agreement between the parties . . .with respect to the subject matter hereof." (Emphasis added.) The Agreement recognizes that the terms of interconnection will evolve and that the Agreement may have to be amended due to judicial decisions related to pending and future litigation, and it provides adequately for that eventuality.

20. Therefore, U S WEST's argument that this a policy decision for the Commission to make as to whether it will approve "piecemeal" agreements is not well taken. If considered as U S WEST posits, none of the agreements the Commission has approved thus far could be considered final agreements as they all have provisions for further negotiations and amendments.

21. When parties execute an interconnection agreement and one or both parties submit it to the Commission for approval, the Commission must approve or reject it (in whole or in part) according to the standards in •252 of the 1996 Act--to determine if it discriminates against a carrier not a party to the agreement or is inconsistent with the public interest, convenience and necessity. The Commission can reject portions of the agreement, but it cannot require additional provisions. U S WEST's argument--that the Commission must expressly provide in the approval order that no party must perform a provision of the Agreement which the party contends has been superseded by the Eighth Circuit's decision--is an argument for an additional provision. Sprint has not agreed to this provision and strongly objects to it. In effect, such a provision would permit a party to disregard terms and conditions that it has agreed upon. If there are questions of interpretation which arise, and it appears there are a number of such questions between Sprint and U S WEST, the contract clearly provides a method for resolving

such issues. The Commission cannot redraft these provisions.

22. U S WEST's due process argument is similarly unconvincing. U S WEST has entered into this Agreement without coercion, the Agreement provides for resolving issues between the parties, and, most significantly, if the Commission does not act within 90 days to approve or reject the agreement, the Agreement will go into effect as is on November 26, 1997, and be deemed approved.

23. Sprint does not object to U S WEST's request that the Commission require the parties to negotiate and submit modifying language to the Commission within 60 days of the Commission's order. However, Sprint suggests a reasonable deadline (such as 60 days) for submitting either negotiated amendments or a request for arbitration of unresolved issues arising from the Eighth Circuit decision. Sprint urges the Commission to approve the Agreement subject to the recognition that it may need to be amended to address the Eighth Circuit decision;

U S WEST urges the Commission, if it approves the Agreement, to recognize in the order that it must be modified pursuant to that decision.

24. The Commission recognizes that the Agreement may need to be modified to reflect the outcome of the Eighth Circuit decision. The parties have agreed in • 2.2 of the Agreement that negotiations will not be "unreasonably delayed, withheld, or conditioned." Because the parties have provided for timely commencement of negotiations, the Commission will not order negotiations be completed in a time certain.

25. The Commission finds that the terms in the parties' Agreement appear to conform to the standards required by the 1996 Act, except as provided below.

The Commission rejects the following provisions:

26. Dispute Resolution - Section 36.29 beginning on p. 249 sets forth the parties' agreement pertaining to resolution of disputes arising under the Agreement. It provides that such disputes may be brought to the Commission through its informal or formal complaint processes or may be referred to negotiation and arbitration under the procedures provided in the Agreement. It includes detailed and extensive arbitration provisions. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to

the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Agreement to include this language.

27. Remedy for Non-Payment of Undisputed Billed Amounts - Section 31.8.7 sets forth in detail the remedy for non-payment to U S WEST by Sprint. It provides that if Sprint fails to make payments of undisputed amounts on dates and times specified, U S WEST may, 30 days after providing written notice to Sprint, refuse additional applications for service and/or refuse to complete any pending orders for Sprint service at any time thereafter. It further provides that if U S WEST does not discontinue services on the date specified in the notice and noncompliance continues, "nothing contained herein shall preclude U S WEST's . . . right to discontinue the provision of the services to Sprint without further notice. Sprint's non-payment to U S WEST, if not made pursuant to the terms of this section, could place Sprint's end user customers' services in jeopardy of being disconnected through no fault on their part.

28. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must Sprint. If notified of a pending termination of service to Sprint's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to Sprint's end users with no notification to the Commission. The Commission rejects • 31.8.7 of the parties' Agreement. The parties may amend this section of the Agreement to include a provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.

29. Construction - Section 31.5.7 of the Agreement (pp. 174-75) states:
Resold services are available where facilities currently exist or are
provided in the future as part of U S WEST's normal course of business operations for its end users and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if Sprint requests that

facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for

USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to Sprint a price quote for the construction. If the quote is accepted, Sprint will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected because there may be circumstances which arise where U S WEST, pursuant to its duties as a carrier of last resort, is required by law to construct facilities. The parties may amend this section to address this concern. The agreed upon terms may apply for instances where U S West has no carrier of last resort responsibilities.

30. The Creditworthiness Database: (Section 36.38 on pp. 265-66) This section provides that both Sprint and U S WEST will make available certain customer payment history information--for each person or entity that applies for local service or intraLATA toll services from either carrier--to a mutually agreed upon third-party credit reporting agency. The information to be reported includes the applicants name, address and previous telephone number, if any; the amount of any unpaid balance in the applicant's name; whether the applicant is delinquent on payments; the length of service with the prior local or intraLATA toll provider; whether the applicant had local or intraLATA toll service terminated or suspended within the last six months (including an explanation of the reason therefor); and whether the applicant was required by the prior local or intraLATA toll provider to pay a deposit or make an advance payment, or provide another form of security including the amount of each. This section would permit customer credit information to be reported to a credit reporting agency without the customer's authorization and should be rejected.

31. If the database is used for determining whether a deposit should be required of the applicant, it is not consistent with Commission rules. It includes information that is pertinent to some of the Commission's deposit rules, but not to all of them. In rejecting a provision intended for this purpose in some resale agreements previously reviewed by the Commission, we

expressed our concerns for customer privacy and increased opportunity for anticompetitive conduct. Although the rejected language was much different, this provision raises similar concerns for customer privacy.

32. Further, it establishes a means for Sprint and U S WEST--but no other telecommunications provider--to obtain useful information about potential customers. Such a database, if implemented, should be available to all telecommunications carriers and should be established by a proceeding which includes industry participants, consumer representatives and other interested parties.

33. The Commission rejects this section because is not consistent with Commission regulations, it is otherwise not consistent with the public interest, convenience and necessity, and it discriminates against carriers who are not parties to the Agreement.

34. Customer Authorization: Section 31.3.11.1 on pp. 169-70 applies to the unauthorized switching of providers (slamming). It provides that the procedures may be superseded or modified by FCC rules or industry standards and requires Sprint to produce a record consistent with FCC rules in the event of a slamming dispute. The Commission rejects this entire section because it does not include and does not comply with Montana law and Commission rules on slamming. The parties may amend these sections to include Montana law and Commission rules.

III. Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA. Sprint is a provider of regulated interexchange telecommunications services in the State of Montana, and will also be regulated when it begins offering local exchange service in Montana as a competitive local exchange carrier.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The Commission has jurisdiction to approve the Interconnection Agreement

negotiated by the parties and submitted to the Commission for approval according to Section 252(e)(2)(A). Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. See generally, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. • 151, et seq.). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. • 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the U S WEST/Sprint Agreement by November 26, 1997, or the Agreement will be deemed approved.

IV. Order

THEREFORE, based upon the foregoing, it is ORDERED that the interconnection Agreement between U S WEST Communications, Inc. and Sprint Communications Company, L.P., is approved as discussed herein, subject to the following conditions:

1. Within 14 days of service of this order the parties may file an amendment to the Agreement consistent with the Commission's decision in this proceeding.

2. The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 25th day of November, 1997, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION.

Dave Fisher, Chairman

Nancy McCaffree, Vice Chair

Bob Anderson, Commissioner

Danny Oberg, Commissioner

Bob Rowe, Commissioner

Attest:

Kathleen M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.